

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
98096-76H BY TIMOTHY G. AND)	
KATHLEEN M. HUGHES)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the January 7, 1997, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 98096-76H is granted to Timothy G. and Kathleen M. Hughes to appropriate 60 gallons per minute up to 95.70 acre-feet per year for fishery use from groundwater at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, Township 3 North, Range 21 West, Ravalli County, Montana. The means of diversion shall be five developed springs which flow into an existing ditch. The place of use shall be the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 10. The period of diversion shall be from January 1 through December 31, inclusive of each year. The water will be diverted from the ditch into three off-stream ponds. The ponds

CASE # 98096

will be constructed so the water would flow through the ponds and back into the ditch with little or no delay.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The issuance of this permit by the Department shall not reduce the Permittees' liability for damages caused by the exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittees' exercise of this permit.

C. The permittees shall install measuring devices that will allow the inflow and the outflow to be measured. The type of devices and places of installation shall be determined by the Regional Manager of the Missoula Water Resources Regional Office. Upon receipt of this permit, Applicants shall contact the Regional Manager, Curt Martin, at Missoula Water Resources Regional Office, 1610 South 3rd St. West, Suite 103, P.O. Box 5004, Missoula, MT 59806, to determine the type and location of the measuring devices.

D. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition

in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 27 day of February, 1997.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 3rd day of

MARCH
~~February~~, 1997 as follows:

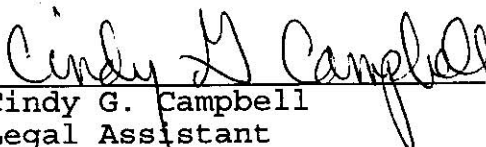
Timothy G. Hughes
Kathleen M. Hughes
283 Bunkhouse Rd.
Darby, MT 59829

Kenneth W. Roy
3097 Old Darby Rd.
Darby, MT 59829

Robert H. Scott
Attorney at Law
P.O. Box 7826
Missoula, MT 59807

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601

Curt Martin, Manager
Karl Uhlig, WRS
Missoula Water Resources
Regional Office
1610 South 3rd St. West,
Suite 103
P.O. Box 5004
Missoula, MT 59806
(via electronic mail)


Cindy G. Campbell
Legal Assistant

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
98096-76H BY TIMOTHY G. AND)	DECISION
KATHLEEN M. HUGHES)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on December 5, 1996, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Applicants for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1995).

APPEARANCES

Applicants, Timothy G. and Kathleen M. Hughes, appeared at the hearing by and through counsel, Robert H. Scott.

Lee Yelin, Senior Water Rights Specialist with Water Rights, Inc., appeared at the hearing as a witness for Applicants.

Glen Wright, a longtime resident who built some of the ditches, appeared at the hearing as a witness for Applicants.

Objector Kenneth W. Roy appeared at the hearing *pro se*.

Gary Reddin appeared at the hearing as a witness for Objector.

Karl Uhlig, Water Resources Specialist with the Department of Natural Resources and Conservation (Department) appeared at the hearing and was called as a witness by Objector.

CASE # 98096

EXHIBITS

Applicants offered five exhibits for the record.

Applicants' Exhibit 1 is a hand-drawn map. It shows the location of the springs which are the proposed source; the sites where the flow rate was measured; the proposed ponds; the collection ditch; pit excavations; the existing raceway and ponds; the fish hatchery; Applicants' home; and Bunkhouse Creek Road. This exhibit was accepted into the record without objection.

Applicants' Exhibit 2 is a chart of eight flow measurements. Three were taken on the north side of Bunkhouse Creek Road and one was taken on the immediate south side of Bunkhouse Creek Road. This measurement was listed as being on the north side of the road; however the measurement was taken as the water flowed through the culvert in the road. Four more measurements were taken on the south side of Bunkhouse Creek Road at points marked on Applicants' Exhibit 1.

Mr. Roy objected to this exhibit because he did not understand the measurements. Even after the rate was calculated into miner's inches, and the method of measurement was explained, Mr. Roy still objected to the exhibit because he had never measured by the bucket and stopwatch method. A bucket and stopwatch is the easiest, most straightforward, and accurate method of water measurement. This method is easily performed by any person, skilled or unskilled, in water measurement. The

objection is overruled and Applicants' Exhibit 2 is accepted into the record.

Applicants' Exhibit 3 is a twelve-page document which contains a study of evapotranspiration. Mr. Roy objected to this exhibit because the document did not discuss what he thought the situation was in this case. Mr. Roy did not understand that the only information pertinent in this case was the information about the area which would be disturbed by the pond excavation. The pertinent information is included in this report in the Crop ET, Wetlands Evapotranspiration, the Shallow Water and Free Water Surface Evaporation sections, and in the graphs and charts referring to Corvallis. The objection is overruled and Applicants' Exhibit 3 is accepted into the record.

Applicants' Exhibit 4 is a two-page document which describes the test results of the soils removed from the ponds' areas. Mr. Roy objected to this exhibit on the basis that there are lenses and fissures in the ground that may not show on this test. The soil samples were taken from the area where the ponds were to be excavated. While there may be slight changes in the soil in some areas the soils will, for the most part, be the type shown in the test. The objection is overruled and Applicants' Exhibit 4 is accepted into the record.

Applicants' Exhibit 5 consists of six pages upon which photographs are affixed. Each photograph has an explanation of the scene either below the photograph or beside it. This exhibit was accepted in the record without objection.

PRELIMINARY MATTERS

At the beginning of the hearing, Applicants moved to delete the domestic use from the application. The motion was granted. The application is now for fishery use only.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. An application for beneficial water use permit in the name of Timothy G. and Kathleen M. Hughes and signed by Timothy Hughes was received by the Department May 24, 1996, at 10:05 a.m. (Department file.)

2. Pertinent portions of the application were published in the Ravalli Republic on July 18, 1996. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. One timely objection was received by the Department. Applicants were notified of the objection by a letter from the Department dated September 6, 1996. (Department file.)

3. Applicants propose to appropriate 60 gallons per minute up to 95.70 acre-feet per year for fishery use from groundwater at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, Township 3 North,

Range 21 West, Ravalli County, Montana.¹ The proposed means of diversion is five developed springs which flow into an existing ditch. The proposed place of use is the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 10. The proposed period of diversion is from January 1 through December 31, inclusive of each year. The water would be diverted from the ditch into three off-stream ponds. The ponds would be constructed so the water would flow through the ponds and back into the ditch with little or no delay. The ditch water ultimately flows into Bunkhouse Creek. (Department file, testimony of Timothy Hughes and Lee Yelin.)

4. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. A six-inch pvc pipe will convey the water from the ditch to the first pond which would be long and narrow like a raceway. The water would flow through a six-inch pvc pipe into the second pond which would also be long and narrow. The proposed dimensions of the first two ponds is 100 feet long, 50 feet wide, and 6 feet deep. From the second pond, the water would flow through a six-inch pvc pipe into the third pond which would be 225 feet long, 75 feet wide, and 10 feet deep. The water would flow from the third pond through a six-inch pvc pipe back into the ditch. Applicants have taken soil samples at the proposed location of the ponds. These

¹Unless otherwise stated all land descriptions in this Proposal are located in Township 3 North, Range 21 West, Ravalli County, Montana.

samples were analyzed by a certified soil scientist who found the hydraulic conductivity value range of the soil is very low, nearly impermeable. There would be negligible water loss to seepage. Applicants have a fishery on the south side of Bunkhouse Creek Road which they have successfully operated for three years which indicates proper management and operation of the project. (Department file, Applicants' Exhibits 1 and 4, testimony of Timothy Hughes and Lee Yelin.)

5. Applicants have proven by a preponderance of evidence the proposed use of water, fishery, is a beneficial use. Currently Applicants have a small aquaculture project growing trout. Operating under a commercial license from the State, Applicants sell trout locally to people who wish to stock their ponds with trout. Applicants also have a small dressed-trout market where they supply some of the area supermarkets with fresh trout. (Testimony of Timothy Hughes.)

6. Applicants have proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate and that the amount requested is reasonably available during the period in which Applicants seek to appropriate. Applicants measured the flow rate of all the springs on March 26, 1996, to be 60 gallons per minute. On April 10, 1996, Applicants measured the flow rate to be 70 gallons per minute during a heavy rain. On April 29, 1996, Applicants measured the flow to be 60 gallons

per minute. On May 2, 1996, Applicants measured the flow rate to be 60 gallons per minute. On November 14, 1996, normally a low flow period, Lee Yelin measured the individual flows of the springs as follows: the first three springs were flowing at a cumulative rate of 28.3 gallons per minute; the fourth spring was flowing at a rate of 12.9 gallons per minute; and the fifth spring was flowing at a rate of 14.1 gallons per minute which calculates to be a total of 55.3 gallons per minute. (Department file, Applicants' Exhibits 1 and 5, testimony of Lee Yelin and Timothy Hughes.)

7. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator would not be adversely affected. Applicants' proposed project is a flow-through fishery which will have little or no seepage loss. The water will be transported from the ditch, between the ponds, and back to the ditch in closed pvc pipe from which there will be no loss to evaporation and seepage. The evaporation loss from the surfaces of the ponds would be less than or equal to the evapotranspiration loss from the vegetation that now grows in the proposed pond sites. There are no other users between the point in the ditch where the water is diverted and the point where the water is returned to the ditch. There is one user down ditch from Applicants' proposed point of diversion. Applicants have agreed to install measuring devices on the intake and outlet to ensure the same amount of water diverted returns to the ditch. Objector Roy believes Applicants should be required to install a

measuring device in Bunkhouse Creek. Applicants are not appropriating from Bunkhouse Creek and cannot be required to install such a measuring device. (Department file, testimony of Timothy Hughes and Lee Yelin, and Applicants' Exhibits 1 and 3.)

8. Applicants have proven by a preponderance of evidence the proposed use would not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. There are no pending projects on this source for which permits have been issued or for which water has been reserved under state law. (Department file.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.

10. Applicants have proven by a preponderance of evidence they have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicants own the property where the water would be put to beneficial use. (Department file.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing

Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 10. Mont. Code Ann. § 85-2-311 (1995).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 98096-76H is granted to Timothy G. and Kathleen M. Hughes to appropriate 60 gallons per minute up to 95.70 acre-feet per year for fishery use from groundwater at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, Township 3 North, Range 21 West, Ravalli County, Montana. The means of diversion shall be five developed springs which flow into an existing ditch. The place of use shall be the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 10. The period of diversion shall be from January 1 through December 31, inclusive of each year. The water will be diverted from the ditch into three off-stream ponds. The ponds will be constructed so the water would flow through the ponds and back into the ditch with little or no delay.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The issuance of this permit by the Department shall not reduce the Permittees' liability for damages caused by the exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittees' exercise of this permit.

C. The permittees shall install measuring devices that will allow the inflow and the outflow to be measured. The type of devices and places of installation shall be determined by the Regional Manager of the Missoula Water Resources Regional Office. Upon receipt of this permit, Applicants shall contact the Regional Manager, Curt Martin, at Missoula Water Resources Regional Office, 1610 South 3rd St. West, Suite 103, P.O. Box 5004, Missoula, MT 59806, to determine the type and location of the measuring devices.

D. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

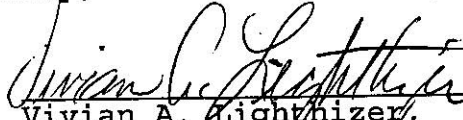
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20

days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 7th day of January, 1997.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 7th day of January, 1997, as follows:

Timothy G. Hughes
Kathleen M. Hughes
283 Bunkhouse Rd.
Darby, MT 59829

Robert H. Scott
Attorney at Law
P.O. Box 7826
Missoula, MT 59807

Kenneth W. Roy
3097 Old Darby Rd.
Darby, MT 59829

Curt Martin, Manager
Karl Uhlig, WRS
Missoula Water Resources
Regional Office
1610 South 3rd St. West,
Suite 103
P.O. Box 5004
Missoula, MT 59806


Cindy G. Campbell
Legal Assistant